APPENDIX A

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

JOGANANDA HAZRA,

Plaintiff,

[Filed Sept. 5, 1990]

-V-

Case No. C2-89-551

NATIONAL Rx SERVICES, INC.,

Defendant.

OPINION AND ORDER

This matter is before the Court upon the Defendant, National Rx Services, Inc.'s, Motion for Summary Judgment pursuant to Federal Rule of Civil Procedure 56. In response the Plaintiff, Jogananda Hazra ("Hazra"), has filed a "Motion to Deny Defendant's Motion for Summary Judgment". The defendant has since filed with the Court a Reply and a Supplemental Reply. This case was brought through a Complaint under Title 42 U.S.C. §2000e-5(f)(1) for alleged unlawful employment practices based upon race and nationality, and discrimination bases upon age in violation of the Age Discrimination in Employment Act, 29 U.S.C. §621 *et seq.*

FACTS

The Defendant, Hazra, is originally from India and of the Asian Race. Furthermore, Hazra was born on May 30, 1935, and as such was over the age of 40 when the alleged cause of action arose. In this action, Hazra claims that National Rx unlawfully discriminated against him based upon his national origin, his race, and his age when they terminated his employment with them on October 30, 1987.

Hazra's employment began with a co-subsidiary of the defendant, National Pharmacies, Inc., in Elmwood Park, New Jersey, in April of 1983, when he was hired as a junior pharmacist. The Junior Pharmacist position was an unlicensed pharmacy position. Specifically, National Pharmacies, Inc. and Defendant National Rx Services, Inc. are subsidiaries of the same parent company. At the time of the plaintiff's hiring he was 47 years old, and thus already a member of the over 40 protected class. The plaintiff has admitted that he was not discriminated against because of his age, race or national origin at the time of his hiring in New Jersey. In February of 1984, Hazra voluntarily transferred from his position with National Pharmacies, Inc., to a job in Ohio with the defendant National Rx Services, Inc.

Defendant National Rx Services, Inc., operates a mail-service pharmacy in Columbus, Ohio. It is through this service that patient's prescriptions can be filled and provided to them through the mail. As is required by law, a licensed registered pharmacist must review, check and approve each prescription that is dispensed by the company.

After his transfer, Hazra registered as a pharmacy intern in order to become a licensed pharmacist. To become registered

the intern must work under the supervision of a registered pharmacist, or "preceptor". The registered pharmacist or preceptor must agree to supervise the intern. National Rx agreed to act in this capacity on behalf of the plaintiff. In the plaintiff's deposition at page 37, Hazra affirmatively responded to the defendant's proposition that, ". . . if the company intended to discriminate against you because of your age, it hardly would have acted as your preceptor, would it?" At some point thereafter Hazra became a registered pharmacist. On March 5, 1985, the defendant "hired" Hazra for the position of registered pharmacist. Hazra admits that there was no discrimination in the hiring of him for the position; which included a raise in pay. The position called for the plaintiff to take bottles off a conveyor belt and compare the already filled prescription with its label to determine if it had been properly filled. This job carried with it the standard responsibilities of any registered pharmacist licensed by the State of Ohio. Under Ohio law, Ohio Revised Code, Chapter 4729 and the Ohio Administrative Code, Chapter 4729-1 *et seq.*, each registered pharmacist is required to ensure that each drug that he or she dispenses to a patient is the same drug that the physician prescribed to the patient. According to the plaintiff's own deposition the registered pharmacist has the additional responsibility of ensuring that the label on the prescribed bottle correctly identifies the dispensed drug, and to this responsibility the pharmacist is held strictly accountable if the wrong drug, or the wrong strength of drug is prescribed to the patient. It was allegedly pursuant to these stringent requirements that the company adopted a disciplinary policy for staff registered pharmacists who commit dispensing errors. These policies were instituted in the Spring of 1987. According to the Defendant, corrective action is taken whenever a staff registered pharmacist dispenses a prescription that results in the patient receiving the wrong drug, the wrong strength, the

wrong dosage, or form of drug, or its equivalent generic form of the drug where the brand name drug was prescribed. National Rx contends that they review each situation independently and employ the following measures: counselling, warning, probation, and termination. The Company states as a general guideline that under this policy, a staff registered pharmacist is warned and placed on probation if he or she commits three "significant" dispensing errors within a three month period. Examples of a "significant" dispensing error would be erroneously providing the patient with the wrong strength of drug, or the wrong drug all together. The policy further provides that any further dispensing error during the probationary period can result in termination. The defendant states that the policy was communicated to all of the pharmacists over a one month period at weekly meetings and that the policy was a "guideline" for disciplinary action, and would be applied on a case-by-case basis.

On May 12, 1987, Hazra dispensed a drug which was double the strength prescribed by the physician. Hazra's supervisor's met with him and discussed with him the importance of accuracy. The defendant also alleges that they informed Hazra to slow his pace if it would aid his accuracy.[1]

On June 26, 1987, Hazra was called upon to dispense a drug known as Depakote at a 250 milligram strength. Instead, the prescription was filled with 500 milligram tablets, double the

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[1]At a later point the plaintiff contends that he was never advised to slow his pace to improve his accuracy. For purposes of the instant motion the factual discrepancy is of minimal relevance and certainly does not give rise to a genuine issue.

strength of the actual prescription. Hazra's supervisors again met with him and again cautioned him to be more careful.

A few days later, Hazra was again reprimanded for erroneously dispensing a sublingual form of a drug (to be placed under the tongue of the patient) rather than the prescribed oral form of the drug (to be swallowed). The plaintiff acknowledged that this was his third error in two months, and that he could have been discharged for making the errors, ". . .if that's what they wanted." (See Hazra deposition at p. 80). Instead, the plaintiff was placed on probation and informed that any additional mistakes in the next 60 days would result in his termination.

Less than thirty days later the plaintiff committed an additional dispensing error. Hazra acknowledged that he could have been discharged for his latest mistake, however, he was instead permitted another chance. Hazra was placed on 90-days probation, and again he was informed that any additional errors would result in his termination.

In October of 1987, Hazra committed two additional dispensing errors defined as "serious" by the defendant. In both instances the plaintiff dispensed the wrong drug. Hazra acknowledged the errors by conceding that the medication that was sent to each patient was not the medication that had been prescribed. The defendant contends that based upon these six separated errors Hazra was terminated. This contention is not refuted by the plaintiff, and in fact the plaintiff recognizes his errors and does not dispute that these errors were the stated basis for his termination. Instead, the plaintiff bases his claim upon a statistical argument. The argument essentially follows the logic that he may have in fact committed the above-referenced errors, however, based upon the total number

of prescriptions filled by him his error rate[2] was below that of the company's average for all pharmacists. The plaintiff obtained the Defendant National Rx's error rate from an article printed in the October 1987 issue of *U.S. Pharmacist* entitled "What Do Mail-Order Rxs Really Mean for Pharmacy?". Based upon the plaintiff's statistics he concludes that the defendant's must have discriminated against him based on either his age, race, nationality, or a combination of these factors because his error rate was below that of the company's average.[3]

STANDARD OF REVIEW

In considering this motion, the Court is mindful that the standard for summary judgment "mirrors the standard for a directed verdict under [Rule 50(a)], which is that the trial judge must direct a verdict if, under the governing law, there can be but one reasonable conclusion as to the verdict." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986) citing *Brady v. Southern Ry. Co.*, 320 U.S. 476, 479-480 (1943). Thus, the Supreme Court concluded in *Anderson* that a judge considering

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[2]Presumably, the error rate is the number of errors per one hundred prescriptions filled.

[3]This is due to his own calculation that his six errors amounted to an error rate of 0.0097, while either Medco Pharmacy or National Rx has held themselves out in the aforementioned article as having an error rate of 0.012. His argument is that since his error rate is below that of the company as a whole (the plaintiff presumes the 0.012 representation is a mean error rate of all pharmacists), the stated reason for his termination, excessive errors, must be pretextual. However, the plaintiff has also admitted that he does not know whether the quoted "error rate" included both nonserious and serious errors, or whether the rate was a mean or a median, or even the exact dates over which the information for the rate was calculated.

a motion for summary judgment must "ask himself not whether he thinks the evidence unmistakably favors one side or the other but whether a fair minded jury could return a verdict for the plaintiff on the evidence presented." 477 U.S. at 252.

Rule 56(c) of the Federal Rules of Civil Procedure provides in pertinent part:

> The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.

In essence, the inquiry is whether the evidence presented a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law. *Anderson*, 477 U.S. at 252.

Such an inquiry necessarily implicates the evidentiary standard of proof that would apply at the trial on the merits. As a result, the Court must view the evidence presented through the prism of the substantive evidentiary burden. Rule 56(e) therefore requires that the nonmoving party go beyond the pleadings and by their own affidavits, or by the depositions, answers to interrogatories, and admissions on file, designate specific facts showing that there is a genuine issue for trial. *Celotex Corp. v. Catrett*, 477 U.S. 317, 324 (1986). The plain language of Rule 56(c) mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish an element essential to that party's case, and on

which that party will bear the burden of proof at trial. *Id.* at 322.

In *Banks v. Rockwell International N. Am. Aircraft Operations*, 666 F.Supp. 1053 (S.D. Ohio 1987) (J. Graham), this district enunciated the importance of granting summary judgments in appropriate situations by stating that: "Although summary judgment should be cautiously invoked, it is an integral part of the Federal Rules which are designed to secure the just, speedy and inexpensive determination of every action." *citing, Celotex Corp. v. Catrett*, 477 U.S. at 324, (quoting Fed. R. Civ. P. l) *Anderson*, 477 U.S. at 252.

Thus, the mere existence of a scintilla of evidence in support of a plaintiff's claim is insufficient--there must be evidence upon which a jury could reasonably find for the plaintiff. Having discussed the Rule 56 standard of review, the Court now turns to the merits.

ANALYSIS

The clearly enunciated rule in this circuit is that age discrimination cases are to be decided on a "case by case basis", utilizing the slightly modified version of the criteria set forth in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973); *see also Wanger v. G.A. Gray Company*, 872 F.2d 142 (6th Cir. 1989). However, a mechanistic application of *McDonnell Douglas* has been explicitly discouraged. *Merkel v. Scovill, Inc.*, 787 F.2d 174, 177 (6th Cir.) (quoting *Sahadi v. Reynolds Chem.*, 636 F.2d 1116, 1118 n.3 (6th Cir. 1980)(per curiam)), *cert. denied*, 479 U.S. 990 (1986); *Ackerman v. Diamond Shamrock Corp.*, 670 F.2d 66, 70 (6th Cir. 1982).

The basic allocation of burdens and order of presentation of proof was first set forth by *McDonnell Douglas*, and later expounded upon by the Supreme Court in *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248, 252-56 (1980), which provided as follows:

> In *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), we set forth the basic allocation of burdens and order of presentation of proof in a Title VII case alleging discriminatory treatment. First, the plaintiff has the burden of proving by the preponderance of the evidence a prima facie case of discrimination. Second, if the plaintiff succeeds in proving the prima facie case, the burden shifts to the defendant 'to articulate some legitimate, nondiscriminatory reason for the employee's rejection.' *Id.*, at 802. Third, should the defendant carry this burden, the plaintiff must then have an opportunity to prove by a preponderance of the evidence that the legitimate reasons offered by the defendant were not its true reasons, but were pretext for discrimination. *Id.* at 804.

Therefore, the Court must first determine if the plaintiff has met the burden of establishing a prima facie case of discrimination.

In an age discrimination case, a discharged employee is called upon to present a prima facie case "by introducing evidence that he was adversely affected by the defendant's employment decisions 'under circumstances which give rise to

an inference of unlawful discrimination.'" *Ridenour v. Lawson Co.*, 791 F.2d 52, 55 (6th Cir. 1986) (quoting *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248, 253 (1981)); *see also Wanger v. G.A. Gray Co.*, 872 F.2d 142 (6th Cir. 1989).

The Court was mindful to note in each decision that the burden of establishing a prima facie case of discrimination is not onerous. *Id.*, at 253. In *McDonnell Douglas*, the Court provided that the initial burden of showing a prima facie case of discrimination is done by demonstrating, by a preponderance of the evidence, the following:

> (i) that the plaintiff is a member of a protected class;
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> (ii) that the plaintiff is qualified for the position and performed as required in the position;
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> (iii) that despite the plaintiff's qualifications and performance, he was terminated; and
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> (iv) that the defendant placed a person outside the protected class in the position or that other reasonable evidence exists for inferring that he was disparately treated.

See generally Wilkens v. Eaton Corp., 790 F.2d 515, 520 (6th Cir. 1986) (quoting Ackerman, 670 F.2d at 69); *Blackwell v. Sun Elec. Corp.*, 696 F.2d 1176, 1180-81 (6th Cir. 1983); *Owens v. Freeman United Coal Mining*, 649 F. Supp. 1565, 1568 (S.D. Ill. 1986).

The Court finds that the plaintiff has failed to meet its initial burden of establishing a prima facie case of discrimination. In

reviewing the four part test, it is not refuted that the plaintiff is a member of a protected class, however, there are serious questions as to whether the plaintiff's performance was what was expected of him in light of his numerous errors. The plaintiff admits the errors were made and to some extent admits that some of the errors were quite serious. His case instead attempts to focus not on his mistakes, but rather on the supposed rate of error for the entire company. However, the plaintiff has not offered this Court any evidence to place the quoted error rate found in the magazine article into context for use in this matter. Instead, the plaintiff wishes this Court to make a wholesale acceptance of the number quoted as being reliable, relevant, error-free, properly quoted, and in context, then use that number to draw a very serious inference of race, nationality or age discrimination.[4] This is merely

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[4]In order for the rate of errors of National Rx, as quoted in the magazine article to become relevant in the instant case it would be necessary for the rate of error to be calculated based upon data accumulated after the policy had been in effect. Only then could the rate be relevantly compared to the rate of error of the plaintiff. Furthermore, the calculations performed by the plaintiff would have to be calculated in the same manner as the figure which was quoted in the magazine article. Also, the plaintiff's calculations and the information used to make the calculations would have to be proven to be correct. These, along with a myriad of other factors would need to be evidenced before the numbers the plaintiff relies upon would become relevant. However, assuming, *arguendo*, the figures used by the plaintiff in his argument were correct, relevant, etc., and the defendant's logic is followed,--that logic being that since the rate of errors was higher for the company as a whole than was his personal rate of errors, then the company must have terminated him based upon discrimination-- at the very least the plaintiff should be able to point to at least one example where an individual that had a worse error rate had not been terminated, presumably because he or she was under forty or american. Instead, the plaintiff is unable to show a single deviation from the set standard of the instituted policy.

hypothecation and speculation that this Court will not enter into.

Based upon the pleadings, exhibits and depositions placed before the Court in this matter it becomes readily apparent that the defendant, National Rx, instituted a very strict policy in an attempt to rectify the problem or at least lower the error rate of prescriptions being filled. The policies appeared to be properly instituted. The Court has been provided no evidence upon which it could conclude that the defendant applied the policies disparately, therefore it must conclude that the policies were applied to all equally. By facts unrefuted by the plaintiff, he made three errors and was placed on probation pursuant to the policies. While under the probation an additional error was made, however, instead of being terminated the plaintiff was again warned and given an opportunity to correct the situation. Nonetheless, additional errors were made and the defendant was terminated. The plaintiff has admitted that he could not name another person who had more errors that had not been terminated, and he further admitted that the errors were the reason for his termination (See the deposition of Hazra at p. 105). Therefore, there appears to have been equal application of the policies as to all employees at National Rx.

Based upon the aforementioned reasons the Court finds that there is no question of material fact, and that the plaintiff has failed to make even a prima facie showing of discrimination, which is needed to prevail as matter of law. Furthermore, the Court finds that the plaintiff has failed to introduce evidence that he was adversely affected by the defendant's employment decision to terminate him, under circumstances which give rise to an inference of unlawful discrimination. Therefore, the

defendant's motion for summary judgment is hereby GRANTED.

IT IS SO ORDERED.

/s/ George C. Smith
GEORGE C. SMITH, JUDGE
UNITED STATES DISTRICT COURT

APPENDIX B

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

JOGANANDA HAZRA,

Plaintiff, [Filed February 12, 1991]

-V- Case No. C2-89-551

NATIONAL Rx SERVICES, INC.,

Defendant.

OPINION AND ORDER

This matter is before the Court upon the Plaintiff, Jogananda Hazra's, Motion to Alter or Amend a Judgment pursuant to Federal Rule of Civil Procedure 59(e) filed September 14, 1990. The plaintiff moves the Court to vacate the Order of September 5, 1990, which granted the Defendant, National Rx Services, Inc.'s, Motion for Summary Judgment pursuant to Federal Rule of Civil Procedure 56, and to alter and issue a new order denying Defendant's Motion for Summary Judgment. In response to plaintiff's motion, defendant has filed a Memorandum Contra Plaintiff's Motion To Vacate Judgment. This case was originally brought through a complaint under Title 42 U.S.C. §2000e-5(f)(1) for alleged unlawful employment practices based upon race and nationality, and discrimination based upon age in violation of 29 U.S.C. §621 *et seq.*

FACTS

The Plaintiff, Jogananda Hazra (Hazra), is originally from India and is of the Asian race. Hazra was born on May 30, 1935 and was, therefore, over the age of forty and within the protected class set forth in 29 U.S.C. §631, when the following events, leading toHP LaserJet IIPHPLASIIP.PRSorigin when they terminated his employment with them on October 30, 1987.

Hazra began employment with a co-subsidiary of the defendant, National Pharmacies, Inc., in Elmwood Park, New Jersey, in April of 1983. The plaintiff was hired as a Junior Pharmacist which is an unlicensed pharmacy position. The plaintiff has admitted that he was not the victim of discrimination based upon his age, race or national origin at the time of his hiring in New Jersey. (Plaintiff's deposition page 29). In February of 1984, Hazra voluntarily transferred to a job in Ohio with the defendant, National Rx. The plaintiff has admitted that there was no discrimination involved in his transfer to Ohio. (Plaintiff's deposition page 32).

Defendant, National Rx, operates a mail service pharmacy in Columbus, Ohio. It is through this service that patient's prescriptions can be filled and provided to them through the mail. The law requires that each prescription that is dispensed by the company must be reviewed, checked and approved by a licensed pharmacist.

After his transfer to National Rx, Hazra registered as a pharmacy intern in order to become a licensed pharmacist. In order to become registered, the intern must work under the supervision of a registered pharmacist referred to as a "preceptor". National Rx agreed to act in this capacity on behalf of the plaintiff. Hazra has admitted that the defendant's voluntary acceptance of the role of preceptor is inconsistent

with the intention to discriminate. (Plaintiff's deposition page 37).

After Hazra became registered, the defendant "hired" him as a Registered Pharmacist. Again, Hazra admits that there was no discrimination in his hiring for that position, which included a pay raise. (Plaintiff's deposition page 37). Plaintiff's duties entailed taking bottles from a conveyer belt and comparing the previously filled prescription with the bottle's label to determine if it had been properly filled. This position carried with it the standard responsibilities of a registered pharmacist licensed by the State of Ohio. Under Ohio Revised Code, Chapter §4729 and the Ohio Administrative Code, Chapter §4729-1, et seq, each registered pharmacist is required to ensure that each drug that he or she dispenses to a patient is the same drug that the physician prescribed to the patient. Furthermore, as the plaintiff has admitted, it is the additional responsibility of the pharmacist to ensure that the label on the prescribed bottle correctly identifies the dispensed drug and to this responsibility the pharmacist is held strictly accountable if the wrong drug, or the wrong strength of drug is prescribed to the patient. (Plaintiff's deposition p.40).

Apparently due to concerns of quality assurance, National Rx adopted a disciplinary policy for staff registered pharmacists who commit dispensing errors. This policy was instituted in the Spring of 1987. According to the defendant, corrective action is taken whenever a staff registered pharmacist dispenses a prescription that results in the patient receiving the wrong drug, the wrong strength, the wrong dosage, or form of drug, or the equivalent generic form of the drug where the brand name drug was prescribed. National Rx contends that they review each situation independently and employ measures such as counselling, warning, probation, and termination. The company states, as a general guideline, that under the policy, a staff registered pharmacist is warned and placed on probation

if he or she commits three "significant" dispensing errors within a three month period. A "significant" or serious dispensing error would entail providing the wrong strength or wrong drug to the patient. The policy further provides that any further dispensing error during the probationary period can result in termination. The defendant states that the policy was communicated to all of the pharmacists over a one month period at weekly meetings and that the policy was a "guideline" for disciplinary action and would be applied on a case-by-case basis. (Affidavit of John R. Siddle).

On May 12, 1987, Hazra was counseled by his superiors concerning a dispensing error in which Hazra dispensed a drug which was double the strength prescribed by the physician. Hazra's supervisors discussed the importance of accuracy with him at this meeting.[1]

On June 26, 1987, Hazra was again counseled by his superiors for a dispensing error. Hazra again dispensed a drug which was double the strength prescribed by the physician and was again cautioned to be more careful in his quality performance.

A few days later, on June 30, 1987, Hazra was again counseled by his supervisors for a dispensing error. Hazra erroneously dispensed a sublingual form of a drug (to be placed under the tongue of the patient) rather than the prescribed oral form of the drug (to be swallowed by the patient). The plaintiff has acknowledged that this was his third dispensing error in two months, and that he could have been discharged for making the errors, ". . .if that's what they wanted." (Plaintiff's deposition p. 80). Instead of discharge, Hazra was placed on probation and informed that any

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[1] Although not specifically stated, the need to properly fill prescriptions is apparent to this Court. Individuals rely upon their doctors and pharmacists without any independent means to discover latent errors.

additional mistakes in the next 60 days would result in termination.

Less than 30 days later, on July 27, 1987, Hazra was yet again counseled concerning a dispensing error. Hazra acknowledged that he could have been discharged for his latest mistake. (Plaintiff's deposition p. 81). Instead of terminating his employment the defendant placed Hazra on a 90 day probation, and again informed him that any additional errors would result in his termination.

In October of 1987, Hazra committed two additional dispensing errors defined as "serious" by the defendant. In both instances the plaintiff dispensed the wrong drug. Hazra was terminated on October 30, 1987. The defendant claims that Hazra's discharge was based upon these six separate dispensing errors. The plaintiff does not refute the defendant's contention. Hazra has acknowledged his errors and does not dispute that these errors were the stated basis for his termination. Instead, the plaintiff based his claim on a statistical argument. Plaintiff's argument was essentially that although he committed the errors mentioned above, his error rate (number of errors in relation to the total number of prescriptions filled) was below the average error rate for all of the company's pharmacists. The plaintiff obtained the company's error rate from an article printed in the October 1987 issue of U.S. Pharmacist entitled "What Do Mail-Order Rxs Really Mean for Pharmacy?". Based upon the plaintiff's statistics he concluded that the defendant must have discriminated against him based on either his age, race, nationality, or a combination of these factors because his error rate was below that of the company's average.

This Court granted Defendant's Motion for Summary Judgment in its Order of September 5, 1990. This Court found that there was no question of material fact, and that the plaintiff had failed to make even a prima facie showing of

discrimination, which is needed to prevail as a matter of law. The Court further found that the plaintiff has failed to "introduce evidence that he was adversely affected by the defendant's employment decision to terminate him, 'under circumstances which give rise to an inference of unlawful discrimination.'" Ridenour v. Lawson Co., 791 F.2d 52, 55 (6th Cir. 1986) (quoting Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248, 253 (1981)). The Court found that the plaintiff had not meet the initial burden of establishing a prima facie case of discrimination as set forth in McDonnell Douglas, Corp. v. Green, 411 U.S. 792 (1973). Specifically, the plaintiff failed to prove that he had performed as required in the position in light of the six dispensing errors. The Court could not accept the plaintiff's statistical argument as he had failed to present any evidence allowing the error rate to be applied in this context. The Court could not accept the bald assertion of the differing error rates, as calculated by the plaintiff, as the basis for an inference of discrimination without any proof of their being reliable, relevant, error-free, properly quoted, or in context. Furthermore, plaintiff failed to show one instance where an individual with a worse error rate was not fired.

The plaintiff now moves to vacate the Order of September 5, 1990 which granted Defendant's Motion for Summary Judgment. The plaintiff claims that there has been an error of law in granting the motion and that counsel for the defendant has perpetrated fraud upon the Court. The plaintiff claims that defendant's denial of a specific question in the plaintiff's interrogatories concerning an alleged conversation in 1985 between the plaintiff and one of his supervisor's, Steve Harris, constitutes fraud upon the Court. Furthermore, the plaintiff asserts, again based upon the defendant's denial, that there is a disputed fact and therefore, the granting of the motion for summary judgment was an error of law. The plaintiff also

claims that he meet the initial burden of establishing a prima facie case. Plaintiff further asserts that he would have no problem in proving disparate treatment. For these reasons, the plaintiff moves the Court to vacate its order granting summary judgment.

STANDARD OF REVIEW

Plaintiff's motion to vacate, alter and to issue a new order is properly considered a Motion to Alter or Amend a Judgment pursuant to Federal Rule of Civil Procedure 59(e). Fed. R. Civ. P. 59(e); Smith v. Hudson, 600 F.2d 60 (6th Cir.), cert. dismissed, 444 U.S. 986 (1979); see Foman v. Davis, 371 U.S. 178, 181 (1962); Huff v. Metropolitan Life Insurance Co., 675 F.2d 119 (6th cir. 1982); Kennedy v. City of Cleveland, 797 F.2d 297, 304 (6th Cir. 1986). The grant or denial of a Rule 59(e) motion is within the informed discretion of the district court and is reversible only upon the showing of abuse. United States Labor Party v. Oremus, 619 F.2d 683, 692 (7th Cir. 1980); also see Hopkins v. Coen, 431 F.2d 1055, 1059 (6th Cir. 1970); Milwee v. Peachtree Cypress Investment Co., 510 F.Supp. 284, 289-90 (E.D. Tenn. 1978).

ANALYSIS

Plaintiff's motion to vacate is based primarily upon a single factual claim that a conversation allegedly occurred in 1985 between the plaintiff and one of his supervisor's, Steve Harris. Plaintiff claims that at that time Mr. Harris told the plaintiff to increase his speed. The defendant has denied the occurrence in its answer to plaintiff's interrogatories. The plaintiff claims that defendant's denial of the occurrence is a basis for overturning the Order for Summary Judgment. Plaintiff claims that defendant's denial constitutes fraud upon the court, which

is a basis for vacating the judgment. Plaintiff also claims that defendant's denial shows that the issue is in dispute and, therefore, there is an error of law in the granting of a summary judgment motion. Plaintiff also alleges that he can prove disparate treatment and that he has, in fact, satisfied the prima facie burden of McDonnell Douglas. The court will now examine these claims seriatim.

While it is undoubtedly true that the occurrence of the alleged discussion is in dispute in so much as defendant denies it occurred, it is also true that the fact is irrelevant and immaterial to the case at bar. The alleged discussion took place two years before the events leading to the plaintiff's employment termination. Furthermore, even if the conversation occurred, a new policy had been implemented and there is evidence that plaintiff's supervisors counseled him to slow down if necessary.

In addition to the factual immateriality, the occurrence or non-occurrence of the conversation is legally immaterial. Even if plaintiff was subject to the alleged pressure to "speed up", plaintiff has admitted that there was no disparate treatment in the application of the pressure. Plaintiff admitted that "all of the pharmacists were under the same pressures in terms of speed". (Plaintiff's deposition p. 171). No inference of unlawful discrimination can be gained from this disputed fact.

The dispute over the occurrence of the conversation is also immaterial, as are all other disputed issues in the case, as plaintiff failed to prove an essential element necessary for him to prevail. Plaintiff failed to meet the prima facie requirement set forth in McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973). Specifically, plaintiff failed to prove that he was qualified for the position. Since the plaintiff completely failed to prove an essential element of his case, all other facts are immaterial. see Celotex Corp. v. Catrett, 477 U.S. 317, 323. This failure to meet the prima facie burden makes the factual

dispute immaterial as "[o]nly disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment...[f]actual disputes that are irrelevant or unnecessary will not be counted." Anderson v. Liberty Lobby. Inc., 477 U.S. 242, 248. Plaintiff's alleged disputed issue is not a "material fact" and as such, there remains no genuine issue of material fact. Therefore, summary judgment was properly granted and there is no error of law.

Plaintiff's allegation that defendant's denial of the occurrence in its answer to plaintiff's interrogatories constitutes fraud upon the court is without merit. A mere dispute of an immaterial issue does not constitute fraud. Furthermore, the plaintiff has the burden to demonstrate, by clear and convincing evidence, fraud upon the court. Plaintiff has failed to meet this burden. In any respect, such a decision is well within the informed discretion of the court and there are no grounds for overturning a court order. see generally Wright and Miller Federal Practice and Procedure §2860 p. 254, 256.

The plaintiff also baldly asserts that he would have no problem showing disparate treatment. The plaintiff in "opposing a properly supported motion for summary judgment may not rest upon the mere allegations or denials of his pleading, but. . .must set forth specific facts showing that there is a genuine issue for trial.'" Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 citing First National Bank of Arizona v. Cities Service Co., 391 U.S. 253. There is nothing in the pleadings, affidavits or memorandum to demonstrate disparate treatment and plaintiff offers no new facts. The time for bald assertions has passed, there is nothing in the record, nor does the plaintiff now provide any new information, that leads to even an inference of unlawful discrimination.

Finally, plaintiff asserts that he did indeed meet the prima facie burden set forth in McDonnell Douglas. The plaintiff

claims that he must be qualified for the position as he was hired for the position. However, as plaintiff admits, he became "unqualified" for the position on the basis of six separate dispensing errors. The question is not whether he was originally qualified for the position but whether he was "performing his job at a level that met his employer's legitimate expectations." *Loeb v Textron, Inc.* 600 F.2d 1014 (1st Cir. 1979). In light of the six dispensing errors it can hardly be said that he "was doing his job well enough to rule out the possibility that he was fired for inadequate job performance" *Loeb*. Plaintiff has failed to demonstrate that he was performing his job as expected and, therefore, has failed to meet the prima facie requirement.

CONCLUSION

Plaintiff's claims of Error of Law and Fraud upon the Court are without merit. The alleged factual dispute cited by the plaintiff in support of his claims is irrelevant and immaterial. The plaintiff has not shown disparate treatment and has failed to meet the prima facie burden for a discrimination case. There is no genuine issue of material fact and summary judgment was properly granted. Therefore, plaintiff's motion to vacate is hereby DENIED.

IT IS SO ORDERED.

/s/ George C. Smith
GEORGE C. SMITH, JUDGE
UNITED STATES DISTRICT COURT

APPENDIX C

No. 91-3201

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

JOGANANDA HAZRA,	)	[Filed July 22, 1991]
	)	
Plaintiff-Appellant,	)	
	)	
	)	
v.	)	ORDER
	)	
	)	NOT RECOMMENDED
NATIONAL RX	)	FOR FULL TEXT
SERVICES, INC.,	)	PUBLICATION
	)	
Defendant-Appellee.	)	

BEFORE: MERRITT, Chief Judge; KEITH, Circuit Judge, and CELEBREZZE, Senior Circuit Judge.

Jogananda Hazra, an Ohio citizen, appeals pro se from the summary judgment for defendant and the order denying his motion to alter or amend the judgment in this action filed under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, and the Age Discrimination in Employment Act, 29 U.S.C. § 621. This case has been referred to a panel of the court pursuant to Rule 9(a), Rules of the Sixth Circuit. Upon examination, this panel unanimously agrees that oral argument is not needed. Fed. R. App. P. 34(a).

Mr. Hazra sought reinstatement, back pay, and punitive damages in this suit, alleging that he had been discharged from his position as a pharmacist on October 30, 1987, on the basis of his age, race, and national origin. The defendant moved for summary judgment, based on evidence that the discharge was due to frequent errors in checking prescriptions in violation of an established policy. The district court granted defendant's motion, and subsequently denied Hazra's Fed. R. Civ. P. 59 motion to alter or amend.

Upon consideration, it is concluded that defendant was entitled to summary judgment, as Hazra failed to establish essential elements of his case on which he has the burden of proof. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986). Hazra did not establish a prima facie case of discrimination, because he did not show that he was qualified for his position. *See Wilkins v. Eaton Corp.*, 790 F.2d 515, 520-21 (6th Cir. 1986). Moreover, he did not establish that the legitimate reason given by defendant for his discharge was pretextual, either by direct evidence of discrimination, or circumstances from which discrimination could be inferred. *See Simpson v. Midland-Ross Corp.*, 823 F.2d 937, 944 (6th Cir. 1987). Accordingly, the district court's judgment is affirmed. Rule 9(b)(3), Rules of the Sixth Circuit.

ENTERED BY ORDER OF THE COURT

/s/
Clerk

No. 91-3201

ISSUED AS MANDATE: December 5, 1991
COSTS: (Awarded to appellee)

FEES:	$None
PRINTING:	$1,380.25
TOTAL:	$1,380.25

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

- - - - -

Jogananda Hazra, :

Plaintiff, :

vs. : Case No. C2-89-551

National Rx Services, Inc.,

Defendant. :

- - - - -

Deposition of JOGANANDA HAZRA, the Plaintiff herein, called by the Defendant for cross-examination under the Applicable Rules of Federal Civil Procedure, taken before me, Kathryn E. Smith, a Court Reporter and a Notary Public in and for the State of Ohio, pursuant to notice and stipulations of counsel, at the offices of Emens, Hurd, Kegler &

Ritter, 65 East State Street, Columbus, Ohio, on Monday, September 11, 1989, at 9:40 o'clock a.m.

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RUNFOLA & ASSOCIATES (614) 445-8477
COMPUTERIZED TRANSCRIPTION

Q. If any statements of disparaging or discriminating nature would have been made, you would have been sensitive to that, wouldn't you?

A. Sure.

Q. And you don't recall any?

A. No.

Q. So you have no direct evidence that your termination was affected by your age?

A. Direct evidence, no. Except as I said, when I compared the facts.

Q. Same with your national origin?

A. Yeah.

Q. Now looking at the sole basis for your claim, that is that your error rate was less than the mean error rate?

A. Yeah.

A. Besides that measured point is, should not have because I should not have been subjected to that kind of conditioning with threat. I don't know how many people they did this. This is wrong.

Q. I'm sorry.

A. When I was called in and I was asked to give in writing that 30 days I should improve my productivity rate or I should be terminated.

/s/ Jogananda Hazra

JOGANANDA HAZRA

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my seal of office at Columbus, Ohio, on this 16th day of October, 1989.

/s/ Thomas F. Runfola
Notary Public in and for
the State of Ohio

My Commission expires: March 23, 1993

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1 CERTIFICATE

2 STATE OF OHIO :

3 COUNTY OF FRANKLIN : SS.

4 I, Kathryn E. Smith, a Notary Public in and for

5 the State of Ohio duly commissioned and qualified,

6 do hereby certify that JOGANANDA HAZRA was by me

7 first duly sworn to testify to the truth, the whole

8 truth, and nothing but the truth in the cause

9 aforesaid; that the testimony then given by him was

10 by me reduced to stenotypy in the presence of said

11 witness, afterwards transcribed by means of computer;

12 that the foregoing is a true and correct transcript

of the testimony so given by him as aforesaid; and that this deposition was taken at the time and place in the foregoing caption specified, and was completed without adjournment.

I do further certify that I am not a relative, counsel or attorney of either party herein, or otherwise interested in the outcome of this action.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my seal of office at Columbus, Ohio, on this 19th day of September , 1989.

/s/ Kathryn E. Smith
KATHRYN E. SMITH, Notary Public - State of Ohio.

My Commission expires January 14, 1993.

RUNFOLA & ASSOCIATES (614) 445-8477
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